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No. 91-915

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

ISCA ENTERPRISES, RAPJOE REALTY CORP., MICHELLE ASSETS, INC., RO-MALIK ENTERPRISES, LTD., 441-445 EAST 116TH ST., INC., DIAMOND PROPERTIES, INC.,

Petitioners,

v.

THE CITY OF NEW YORK, FELICE MICHETTI, as Commissioner of Housing Preservation and Development, CAROL O'CLEIREACAIN as Commissioner of Finance of the City of New York,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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February 7, 1992

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. In a proceeding where petitioner ISCA Enterprises concedes that it had actual knowledge of the foreclosures four months after the City took title to the properties and well-within the two-year period in which an action to set aside the deeds could have been timely commenced, whether the dismissal of its Article 78 petition, commenced over four years later, on statute of limitations' grounds independently and adequately supports the judgment below thus depriving this Court of jurisdiction to review the case?

2. Whether New York City's in rem tax foreclosure statute, which, in addition to publication and posting, requires that mail notice of tax foreclosure actions be given to those owners who have filed owner's registration cards and to other interested

parties who have filed in rem cards with the Commissioner of the New York City Finance Department and, in the absence of such cards, to the name and address appearing in the latest annual record of assessed valuations, comports with the requirements of procedural due process?

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THE CITY'S IN REM STATUTORY SCHEME WHICH, IN ADDITION TO PUBLICATION AND POSTING, REQUIRES NOTICE OF FORECLOSURE TO BE MAILED TO ALL OWNERS OR OTHER INTERESTED PARTIES WHO HAVE FILED OWNER'S REGISTRATION AND/OR IN REM CARDS OR, IN THE ABSENCE OF SUCH CARDS, TO THE NAME AND ADDRESS APPEARING IN THE LATEST ANNUAL RECORD OF ASSESSED VALUATIONS, FULLY COMPORTS WITH DUE PROCESS.

THE NEW YORK COURT OF APPEALS, WHILE DECLINING TO ADDRESS THE CONSTITUTIONALITY OF THE PROVISION AS RELATING TO MORTGAGEES IN THE ISCA LITIGATION, FOUND THE STATUTE CONSTITUTIONAL AS APPLIED TO THE CAMPBELL PETITIONERS, ALL PROPERTY OWNERS, IN LIGHT OF THE CODE'S ADDITIONAL STATUTORY MECHANISM FOR PROVIDING THAT PROPERTY OWNERS RECEIVE ACTUAL NOTICE OF A FORECLOSURE. THAT DECISION IS FULLY IN ACCORD WITH THIS COURT'S PRECEDENTS AND PRESENTS NO CONFLICT WITH DECISIONS IN OTHER JURISDICTIONS. 33

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COUNTER-STATEMENT OF THE CASE

1. Introduction

A former mortgagee and property owner in the case of ISCA Enterprises v. The City of New York, et al., and five former property owners in the case of Campbell, et

al. v. The City of New York,[1] brought separate actions below challenging the constitutionality of New York City's "notice-by-request" procedure for in rem tax foreclosure actions, asking that the tax deeds on the subject properties be declared void and their interests restored.

The New York Court of Appeals heard the cases together and issued a consolidated decision holding in the ISCA Enterprises case that the proceeding was time-barred since petitioner mortgagee and owner "had actual notice in time to bring suit," and in

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[1] Plaintiff Campbell is not a party to this petition. Rapjoe Realty Corp., Michelle Assets, Inc., Ro-Malik Enterprises, Ltd., 441-445 East 116th St., Inc., Diamond Properties, Inc., all plaintiffs in the consolidated Campbell action are petitioners here. For the sake of clarity, and to avoid confusion with the ISCA Enterprises case, which was never consolidated with Campbell except for decision in the Court of Appeals, we will continue to refer to the Campbell litigation separately.

the Campbell case that "the City's statutory scheme for giving notice to property owners met the requirements of due process."

In so holding, the Court of Appeals expressly noted that, unlike other notice-by-request statutes, "the City Administrative Code provides for additional procedures by which property owners actually receive notice-by-mail to the name and address appearing on the latest annual record of assessed valuations, the key record for tax billing purposes." The factual record in the ISCA Enterprises case made it unnecessary for the Court of Appeals to consider whether the City's notice provisions would also meet due process requirements as to mortgagees. Thus, the issue that petitioners contend was expressly left open by Mennonite Board of Missions v. Adams, 462 U.S. 791, 793 n.2 (1983), and

purports to form the basis for the instant petition, is not presented by this record.

2. New York City's "In Rem" Procedure

Title 11 of the New York City Administrative Code provides for a summary tax foreclosure procedure whenever an outstanding tax lien has been unpaid for more than one year. Administrative Code §11-404[a]. It also sets forth the procedures for notifying interested parties that such a proceeding has been commenced. These procedures are detailed in the Court of Appeals' decision appearing in Petitioners' Appendix A at 1a-3a.

In addition to the requirement that lists of delinquent taxes be filed in the office of the County Clerk (Admin. Code §11-405[3]), as well as in the borough office of the city collector and in the office of the Corporation Counsel (Admin. Code §11-405[f]), the statute provides (1) that upon filing the

list, the Commissioner of Finance shall publish a notice of foreclosure at least once a week for six successive weeks in the City Record and in two newspapers published in and circulated throughout the county in which the affected properties are located (Admin. Code §11-406[a]); and (2) that the Commissioner shall mail a notice of foreclosure to all owners, mortgagees, lienors or encumbrancers who have filed owner's registration or in rem cards pursuant to sections 11-416 and 11-417 of the Administrative Code or, in the absence of such filings, to the name and address appearing in the latest annual record of assessed valuations (Admin. Code §11-406[c]).

Owner registration cards include the owner's name and mailing address (or that of the owner's designee) and are designed to enable the Commissioner to mail bills for

taxes and other charges, as well as foreclosure notices, to the proper party in interest (Admin. Code §11-416). In rem cards may be submitted by any person who is not authorized to receive tax bills, including mortgagees, lienors, encumbrancers, and by owners who have filed owners registration cards designating someone else to receive bills and notices (Admin. Code §11-417). There is no charge for the filing of such cards and they need not be renewed. The failure of the Commissioner to send notice to the names and addresses on file results in the withdrawal of the affected parcels from the foreclosure proceeding. Admin. Code 11-413(a)(3).

For a period of 10 weeks from the date of first publication of the notice of foreclosure, any person claiming an interest in a parcel listed in that notice has the

opportunity to redeem it by paying all delinquent taxes, interest and penalties (Admin. Code §11-407[a]). Upon expiration of this period, an interested party may still redeem a parcel by payment of a 5% penalty in addition to the other charges. This window for redemption is open until the preparation of a judgment of foreclosure has been commenced (Admin. Code §11-407[c]).

An interested party may serve a verified answer within 20 days of the last day for redemption. The service of an answer severs the action as to any parcel in which the defendant has pleaded an interest (Admin. Code §11-409[a]). If no answer is interposed, the court, after satisfying itself that the City has complied with all procedural requirements, is directed to enter final judgment awarding the City possession of the parcels listed (Admin. Code §11-412). The judgment must also contain a direction

to the Commissioner of Finance to prepare, execute and record a deed conveying title to all affected parcels to the City.

After the tax deed is recorded, an owner, mortgagee or other interested party has a period of two years to apply for release of the property (Admin. Code §11-424[a]). If an application is made within four months of the filing date, and all charges owed are paid, the City must grant the release. If an application is made after this four-month "mandatory release" period, but prior to the expiration of the two-year limitation, release of the property is within the discretion of the Board of Estimate.[2]

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[2] The Board of Estimate was dissolved on August 31, 1990 pursuant to this Court's decision in Board of Estimate v. Morris, 489 U.S. 688 (1989). However, it was functioning during all the relevant events occurring here. Release applications are now reviewed by the newly-created In Rem (Footnote Continued)

The Administrative Code further provides that a tax deed "shall be presumptive evidence that the action and all proceedings therein ... and all notices required by law were regular and in accordance with all provisions of law relating thereto." Two years from the recording of the deed the presumption becomes conclusive (Admin. Code, §11-412(c). No action to set aside the tax deed may be commenced after the expiration of this two-year period. Id.

3. The ISCA Enterprises' Litigation

In May 1981, the City of New York commenced an in rem tax foreclosure action to foreclose on all real property located in Kings County with tax delinquencies of more than one year; some 17,000 parcels were listed.

(Footnote Continued)
Foreclosure Release Board. See, Admin. Code §11-424.1 (Local Law 16, 1991).

ISCA Enterprises was the mortgagee on two of these parcels; at some time prior to July of 1983, it became the holder of a deed to a third parcel included in the foreclosure action. There was neither answer nor redemption. On July 28, 1983, the City acquired title to the parcels by deed executed pursuant to judgment entered in the action and recorded the same day.

According to petitioner, it became aware of the foreclosures on or about December 1, 1983, with more than a year and a half left to run on the two-year Statute of Limitations. However, instead of commencing an action to set aside the tax deeds, ISCA Enterprises elected only to file applications for release with the Board of Estimate pursuant to section 11-424 of the Administrative Code. The applications were filed in October 1984 and were subject to the Board of Estimate's discretion. On October

29, 1987, the Board of Estimate denied the applications.

On December 9, 1987, a full four years after learning of the foreclosure, ISCA Enterprises commenced an Article 78 proceeding in the Supreme Court, Kings County. In substance, petitioner sought to set aside the City's tax deeds resulting from in rem tax foreclosure on the ground that it had been denied due process in that it had been given insufficient notice of the action.

By Notice of Motion dated March 3, 1988, the City moved to dismiss the proceeding on the ground that it was time-barred pursuant to section 11-412(c) of the Administrative Code since it was brought more than two years after the recording of the City's tax deed.

Supreme Court granted the City's motion to dismiss, finding that ISCA's cause of action accrued, at the latest, on December

1, 1983. The Court held that the instant action, commenced more than four years later, was time-barred. The Appellate Division, Second Department, affirmed.[3]

4. **The Campbell Litigation**

Eight former owners of some 23 parcels of real estate located in the Borough of Manhattan, City of New York, brought actions, later consolidated, to compel determination of claims to real property pursuant to Article 15 of McKinney's Real Property Actions and Proceedings Law. New York City had commenced in rem tax

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[3] On appeal in the Appellate Division, Second Department, petitioner urged reversal on two-grounds: (1) that "[t]he Court below erred in ruling that the statute of limitations under §11-412[c] had not been tolled by the petitioner's application before the Board of Estimate under §11-421[b] and §11-424"; and (2) that "[r]espondent City of New York, should be estopped from relying upon the statute of limitations under §11-412[c]." No constitutional issues were raised or addressed.

foreclosure actions with respect to each of these parcels and the City's tax deeds were recorded in the period from May 1977 to September 1980. At the time the in rem foreclosure actions were commenced, each parcel had a tax delinquency of 18 months or more.

The instant actions were commenced in September 1986 challenging the adequacy of the notice provisions contained in New York City's tax foreclosure statute, each plaintiff contending that it did not receive notice of the inclusion of its respective properties in the various in rem actions through which title to their former properties was acquired by the City.

It is undisputed that the individual actions comprising this consolidated action were commenced between six and 10½ years after the City's tax deeds were recorded. At the time of commencement of these

actions, plaintiffs had not paid their property taxes for seven to 12 years or more.

As to 13 of the 23 parcels, Supreme Court, New York County, granted plaintiffs' cross-motion for summary judgment, declaring the judgment and deeds for those parcels void. The Appellate Division, First Department, affirmed that portion of the judgment. Only these 13 parcels, formerly owned by five corporate plaintiffs,[4] were the subject of the appeal to the New York State Court of Appeals.

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[4] These five plaintiffs, Rapjoe Realty Corp., Michelle Assets, Inc., Ro-Malik Enterprises, Ltd., 441-445 East 116th St., Inc., and Diamond Properties, Inc., are petitioners here.

OPINION OF THE NEW YORK STATE COURT OF APPEALS

The ISCA Enterprises and Campbell appeals were heard and decided together, both in favor of the City of New York.

(1)

With respect to ISCA Enterprises, the New York Court of Appeals expressly declined to reach the constitutional issue raised, holding that the proceeding was untimely. The Court stated that ISCA's actual notice of the foreclosure action well within the two-year limitation period precluded it from challenging the conclusive presumption raised by the properly recorded foreclosure deed under Administrative Code §11-412(c). The Court concluded that "[h]aving itself delayed commencement of its action for nearly four years from notice, ISCA cannot be heard to complain of a constitutional infirmity in the original notice procedure." The Court rejected ISCA's

argument that the Statute of Limitations was tolled while it pursued its administrative remedy before the Board of Estimate, noting that "ISCA was free to bring its constitutional challenge regardless of its decision to pursue a release, and pursuit of that course should have no tolling effect." Nor was ISCA required to exhaust administrative remedies before pursuing its constitutional challenge.

The Court concluded:

> For these reasons we affirm the order of the Appellate Division upholding the dismissal of ISCA's petition without reaching the constitutional issues tendered for our review. While we understand that the adequacy of the City's "notice-by-request" provision has been a vexing issue particularly with respect to mortgagees, the posture of the present case does not permit us to reach that issue.

(2)

The Court of Appeals did reach the constitutional issue tendered by the plaintiffs

in the Campbell litigation, holding that the scheme of the Administrative Code relating to property owners comports with the requirements of due process. In analyzing the statute under this Court's holdings in Mullane v. Central Hanover Trust Co., 330 U.S. 306 (1950) and Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983), the Court noted that, unlike other notice-by-request statutes that have been held invalid, "the City Administrative Code provides for additional procedures by which property owners actually receive notice-by-mail to the name and address appearing on the latest annual record of assessed valuations, the key record for tax billing purposes."

The Court concluded that "plaintiffs' challenge to the constitutionality of the statute itself must fail in light of this additional statutory mechanism for providing

that property owners receive actual notice of foreclosure."

REASONS FOR DENYING THE WRIT OF CERTIORARI

I.

THE DISMISSAL OF THE ISCA ENTERPRISES' PETITION ON STATE STATUTE OF LIMITATIONS' GROUNDS INDEPENDENTLY AND ADEQUATELY SUPPORTS THE JUDGMENT BELOW THUS DEPRIVING THIS COURT OF JURISDICTION TO REVIEW THE CASE.

(1)

This Court has adhered unwaveringly to the principle that it will not review judgments of state courts that clearly rest on adequate and independent state grounds. Michigan v. Long, 463 U.S. 1032, 1040-1041 (1983). In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. Coleman v. Thompson, ___ U.S. ____, 111 S. Ct. 2546 (1991).

"Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide [such cases]." Id. at 1040.

This Court articulated the rationale for this rule in Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945):

> It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its view of federal laws, our review would amount to nothing more than an advisory opinion.

Thus, the "independent and adequate state ground" rule has been described as "a corollary of the fundamental principle that

the Court lacks jurisdiction to review matters of state law. That principle in turn reflects the Article III limitations on federal judicial power, as well as the jurisdictional restrictions imposed on the Court by 28 U.S.C. §1257." Stern, Gressman, Shapiro, Supreme Court Practice, Sixth Ed. p. 169. This rule applies whether the state law ground is substantive or procedural. Coleman v. Thompson, supra, 111 S.Ct. at 2554.

Since Michigan v. Long, supra, 463 U.S. 1032, this Court, in determining whether state court references to state law constitute adequate and independent state grounds, will no longer look beyond the opinion under review, or require state courts to reconsider cases to clarify the grounds of their decision but, instead, requires a "plain statement" by the Court below as to the basis of its decision.

Here, the New York Court of Appeals could not have been clearer as to the basis of its decision. In deciding the ISCA Enterprises case, the Court held that ISCA's "actual notice of the foreclosure action well within the two-year limitation period precludes that party from challenging the conclusive presumption raised by the properly recorded foreclosure deed," citing New York City Administrative Code §11-412(c). The Court held that "[h]aving itself delayed commencement of its action for nearly four years from notice, ISCA cannot be heard to complain of a constitutional infirmity in the original notice procedure." The Court cited its own prior opinion in Town of Somers v. Covey, 2 N.Y.2d 196, app. dismd. and cert. denied, 354 U.S. 916 (1957), as authority for that proposition.

Thus, the Court held, in effect, that ISCA's failure timely to bring suit within the

two-year limitation period, when it clearly could have done so, acted as a procedural bar to foreclose consideration of ISCA's constitutional claims. Thus, the Court dismissed ISCA's petition "without reaching the constitutional issues tendered for our review." While acknowledging that the adequacy of the City's notice-by-request statute has been a "vexing issue particularly with respect to mortgagees", the Court concluded that "the posture of the present case does not permit us to reach this issue."

The Court's determination that ISCA's claim was time-barred constitutes an adequate and independent state ground for the judgment below and divests this Court of jurisdiction to hear this case.

This Court has declined jurisdiction under the "adequate state ground" doctrine even when the state procedural rule served to bar federal review of a constitutional

claim, as here. Thus, only recently in Coleman v. Thompson, supra, 111 S. Ct. 2546, this Court held that the doctrine applied to bar federal habeas corpus when the state court declined to address the prisoner's federal claims because he had failed to meet a state procedural requirement. In so holding, this Court noted that while it "has long understood the vital interest served by federal procedural rules, even when they serve to bar federal review of constitutional claims," it was now time to recognize, even in the habeas context, that "no less respect should be given to state rules of procedure." Id. at 2565-2566. See also Monger v. Florida, 405 U.S. 958 (1972) (where challenge to constitutionality of state statute was barred on state procedural grounds, this Court denied certiorari "it appearing that judgment of the Supreme Court of Florida rests upon

an adequate state ground." There, the defendant had filed a notice of appeal prior to entry of judgment in the case and his appeal was dismissed on that technicality barring consideration of his First Amendment claims).

There can be no question but that there is a significant interest served by a state procedural rule that bars litigants from asserting stale claims. Indeed, in Board of Regents v. Tomanio, 446 U.S. 478, 488 (1980), this Court recognized:

> "The importance of policies of repose in the federal, as well as in the state system is attested to by the fact that when Congress has provided no statute of limitations for a substantive claim which it created, this Court has nonetheless "borrowed" what it considered to be the most analogous state statute of limitations to bar tardily commenced proceedings... This is obviously a judicial recognition of the fact that Congress, unless it has spoken to the contrary, did not intend by the mere

> creation of a "cause of action" or "claim for relief" that any plaintiff filing a complaint would automatically prevail if only the necessary elements of the federal substantive claim for relief could be established. Thus, in general, state policies of repose cannot be said to be disfavored in federal law.

Indeed, the state rule is consistent with federal law. This Court has held that a constitutional claim can become time-barred just as any other claim can. "Nothing in the Constitution requires otherwise." Block v. North Dakota, 461 U.S. 273, 292 (1983).[5]

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[5] Even if, arguendo, the question of when a cause of action accrues for statute of limitations' purposes under a state statute providing a state remedy is itself a federal question, as petitioners suggest (we think erroneously), application of the federal rule would achieve the same result here. Under federal law, a cause of action accrues when the plaintiff "knows or has reason to know" of his injury. See Cullen v. Margiotta, 811 F.2d 698, 725 (2d Cir. 1987), cert. denied sub nom Nassau County Republican Comm. v. Cullen, 483 U.S. 1021 (1987). Since
(Footnote Continued)

ISCA argued below that the fact that it filed a release application for discretionary release of its property with the Board of Estimate pursuant to section 11-424 of the Administrative Code and awaited the outcome of that process before bringing suit, in effect, tolled the running of the Statute of Limitations on its constitutional claim, and that it was required to exhaust this administrative remedy before bringing suit. The Court of Appeals considered, and properly rejected, both arguments.

In rejecting the argument that ISCA was required to exhaust it's administrative remedies before bringing suit, the Court properly held, citing New York cases, that a

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(Footnote Continued)
ISCA concedes that it had actual knowledge of the foreclosures by December 1983, its action, commenced over four years later, is clearly time-barred under the two-year statute of limitations set forth in the Administrative Code.

claim that a statute is unconstitutional may be raised in a judicial proceeding without first exhausting the administrative review process. Looking to the administrative code provision itself, the Court also rejected ISCA's argument that the Board of Estimate procedure tolled the Statute of Limitations on the constitutional claim.[6]

ISCA contends that the application of a state statute of limitations to cut off a federal constitutional claim for the deprivation of property "before the

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[6] The Court did also cite to this Court's decision in Board of Regents v. Tomanio, supra, 446 U.S. 478, 486-487 which held, under New York law, that the petitioner's time to commence a §1983 action was not tolled during the pendency of her state administrative and judicial remedies. This Court applied not only New York's statute of limitations but its tolling provisions as well, noting that under New York law the time for filing an action is not tolled during the period in which a litigant pursues a related but independent cause of action.

deprivation is finally consummated" is contrary to federal policy, citing Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) (Pet. at 12, n.2). That case is wholly inapposite here. There, the respondent had alleged that the County Planning Commission had taken its property without just compensation by its failure to approve plats proposing further development. This Court held that respondent had not yet obtained a final decision regarding the application of the Tennessee ordinance and regulations to its property, nor utilized the procedures Tennessee provides for obtaining just compensation, and its claim, therefore, was not ripe for review. Significantly, a takings claim, by its very nature, could not mature before that point. Here, in contrast, ISCA's constitutional challenge to the adequacy of

the notice provisions under which its property was foreclosed constituted an independent cause of action which was ripe for review at the time the City's deed of foreclosure was recorded, irrespective of what happened on its release application. Since the administrative code provides that any action to set aside the tax deed must be brought within two years of its recordation, and makes no provision for tolling during the pendency of a release application, the Court of Appeals properly found, on state law grounds, that ISCA's challenge was untimely.

For all of the above-stated reasons, this Court is without jurisdiction to hear ISCA's claims.

(2)

If this Court disagrees, and finds that the ISCA judgment is not supported by an adequate and independent state ground, we acknowledge that, under those circumstances, the State Court's failure to consider the constitutional issue presented necessarily operates as a denial of the claim. While we urge that the City's notice-by-request statute is constitutional and is fully consistent with this Court's decision in Mennonite Board of Missions v. Adams, supra, 462 U.S. 791, we do recognize that some jurisdictions have invalidated similar notice-by-request provisions as applied to mortgagees and other lienors. See cases cited in Petition at 9-11.[7] Even so, until the New York Court

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[7] We submit that the courts in these cases (Footnote Continued)

of Appeals actually rules on the issue, we

(Footnote Continued)
misconstrued this Court's holding in Mennonite. We do not believe that Mennonite can be read to invalidate all notice procedures which merely require the affirmative act of putting one's name on file. Indeed, in another context, a notice-upon-request statute was upheld by this Court in the face of a due process challenge. Lehr v. Robertson, 463 U.S. 248 (1983). Rather, what was rejected in Mennonite was the argument that notice by mail was unnecessary because a mortgagee could find out for itself whether or not the mortgaged parcel was in tax arrears. Under the City's tax law, the City has not relieved itself of the obligation to provide notice by mail. The City is merely using the card system as an efficient means of identifying various interests in real property so that actual notice can be provided. The burden placed on a person with interest in property to file a card with the Commissioner of Finance is no different than requiring the recordation of such interest. As compared with this rather minimal burden, the corresponding burden which would be imposed upon the City by the necessity of searching public records to determine the identity of interest holders would be staggering. New York City has over 900,000 tax parcels and an extremely high tax delinquency rate. In the Brooklyn foreclosure action alone, over 17,000 parcels were involved. The card system strikes a

(Footnote Continued)

would submit that no clear decisional conflict with these other jurisdictions is presented requiring resolution by this Court. Under such circumstances, certiorari should be denied. See Stern, Gressman, Shapiro, Supreme Court Practice, Sixth Ed., §4.3, p. 196.

(Footnote Continued)
reasonable balance between the government's vital interest in enforcing tax obligations swiftly and inexpensively and the property rights of a party with an interest in the parcel.

II.

THE CITY'S IN REM STATUTORY SCHEME WHICH, IN ADDITION TO PUBLICATION AND POSTING, REQUIRES NOTICE OF FORECLOSURE TO BE MAILED TO ALL OWNERS OR OTHER INTERESTED PARTIES WHO HAVE FILED OWNER'S REGISTRATION AND/OR IN REM CARDS OR, IN THE ABSENCE OF SUCH CARDS, TO THE NAME AND ADDRESS APPEARING IN THE LATEST ANNUAL RECORD OF ASSESSED VALUATIONS, FULLY COMPORTS WITH DUE PROCESS.

THE NEW YORK COURT OF APPEALS, WHILE DECLINING TO ADDRESS THE CONSTITUTIONALITY OF THE PROVISION AS RELATING TO MORTGAGEES IN THE ISCA LITIGATION, FOUND THE STATUTE CONSTITUTIONAL AS APPLIED TO THE CAMPBELL PETITIONERS, ALL PROPERTY OWNERS, IN LIGHT OF THE CODE'S ADDITIONAL STATUTORY MECHANISM FOR PROVIDING THAT PROPERTY OWNERS RECEIVE ACTUAL NOTICE OF A FORECLOSURE. THAT DECISION IS FULLY IN ACCORD WITH THIS COURT'S PRECEDENTS AND PRESENTS NO CONFLICT WITH DECISIONS IN OTHER JURISDICTIONS.

The petition should be denied as to the Campbell petitioners as well. Contrary to

petitioners' assertions, the Campbell case does not present the issue which petitioners contend was reserved for future decision by this Court in Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983).

In Mennonite, this Court held that the conducting of a tax sale of a parcel of real property without having given prior actual notice to a mortgagee identified in a publicly-recorded mortgage constituted a violation of the procedural due process rights of the mortgagee. The Indiana statute under scrutiny there provided for notice by publication and posting and notice by certified mail only to the owner at his last known address. The statute contained no provision for actual notice to mortgagees.

The underlying lawsuit in Mennonite was an action to quiet title brought by the tax sale purchaser some four months after the expiration of the redemption period.

The mortgagee, who had not learned of the tax sale until one week after the expiration of the redemption period, opposed the purchaser's motion for summary judgment on the ground that it had not received constitutionally adequate notice of the pending tax sale. Id. at 795. Looking to its landmark decision in Mullane v. Central Bank & Trust Co., 339 U.S. 306 (1950), this Court found that since the mortgagee possessed a legally-protected property interest that would be significantly affected by a tax sale (Id. at 800):

> he is entitled to notice reasonably calculated to apprise him of a pending tax sale. [Citation omitted.] When the mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service. But unless the mortgagee is not reasonably identifiable, constructive notice alone does

not satisfy the mandate of Mullane.

This Court noted that in 1980 Indiana revised the statute to provide for notice by certified mail to any mortgagee of real property which is subject to tax sale proceedings, if the mortgagee requested such notice and agreed to pay a fee. However, this Court expressly declined to pass upon the constitutionality of the 1980 amendment because the events in question occurred earlier. 462 U.S. at 793 n.2.[8]

The constitutionality of a notice-by-request statute as applied to mortgagees, the

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[8] The amended statute was subsequently repealed by Indiana, P.L. 83-1989, §18, effective May 5, 1989. It should be noted that the Indiana statute, unlike New York City's more protective statute, required the mortgagee to renew its registration annually and to pay a fee. In New York City, registration need be done only once, and no fee is required. See, Admin. Code, §§11-416 and 11-417.

issue left open by Mennonite, is not presented by the Campbell litigation which involved only property owners. While we would submit that the City's notice-by-request statute satisfies minimum due process standards with respect to both owners and mortgagees,[9] the Court of Appeals only considered the constitutionality of the statute with respect to owners.

As previously noted, section 11-406(c) of the New York City Administrative Code provides that, in addition to posting and publication, the commissioner of finance shall mail notice of foreclosure to all owners, mortgagees, lienors or encumbrancers who

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[9] See Tax Foreclosure No. 35, The City of New York [Wilson], 127 A.D.2d 220, 514 N.Y.S.2d 390, aff'd on other grds., 71 N.Y.2d 863, 527 N.Y.S. 2d 747, 522 N.E.2d 1044 (1988); Note, The Constitutionality of Request Notice Provisions in In Rem Tax Foreclosure, 56 Fordham L. Rev. 1209 (1988).

have filed owner's registration cards or in rem cards pursuant to section 11-416 or 11-417. However, if such owner's registration or in rem cards have not been filed, "then said notice shall be mailed to the name and address, if any, appearing in the latest annual record of assessed valuations." Admin. Code, §11-406(c).

Referring to this provision, the Court of Appeals found that, unlike other notice-by-request statutes, "the City Administrative Code provides for additional procedures by which property owners actually receive notice by mail to the name and address appearing on the latest annual record of assessed valuations, the key record for tax billing purposes." The Court concluded:

> Plaintiffs do not contest the City's assertion that notice was mailed to the names and addresses listed on the assessment roll entries pertaining to their properties;

> rather they allege that such information was not properly updated. There is no support for that contention in the record. More importantly, plaintiffs' challenge to the constitutionality of the statute itself must fail in light of this additional statutory mechanism for providing that property owners receive actual notice of a foreclosure.

Thus, contrary to petitioners' contentions, New York's holding is not in conflict with other state and federal courts over the resolution of the constitutional issue left unresolved by Mennonite. Every case cited by petitioners involved mortgagees or lienors, not owners. See, Reeder & Associates v. Locker, 542 N.E.2d 1371 (Ind. App. 3d Dist. 1989); Seattle-First National Bank v.Umatilla County, 77 Or. App. 283, 713 P.2d 33, review denied, 300 Or. 704, 716 P.2d 33 (1986); Jefferson Township v. Block 447A, Lot 10, 228 N.J. Super. 1, 548 A.2d 521 (App. Div. 1988); Wylie v. Patton, 720 P.2d 649, 653-54 (Idaho App. 1986);

Small Engine Shop, Inc. v. Cascio, 878 F.2d 883 (5th Cir. 1989).

Since New York's statutory scheme provides for additional procedures by which property owners actually receive notice -- by mail to the name and address appearing on the assessment roll, the Court of Appeals properly found the above-cited cases distinguishable.[10]

Thus, the Court of Appeals, following applicable precedents in this Court, including Mennonite, properly held in the Campbell case that the City Administrative Code provisions satisfy the requirements of

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[10] Indeed, many jurisdictions have the same or similar methods for providing notice. See, e.g., McKinney's Real Property Tax Law, §1002 (notice "to be sent by first class mail to the name and address of the owner or occupant, as shown on the assessment roll"); Ind. Code Ann. §6-1.1-24-4 as discussed in Mennonite, supra, 462 U.S. at 793 (notice should be mailed to owner's "last known address").

due process as to property owners. Petitioners' constitutional claim is insubstantial and the petition should be denied.

(3)

In sum, contrary to petitioners' assertions, this record does not present the issue that this Court, in Mennonite, reserved for a future day, nor is the Court of Appeals' decision in conflict with the decisions of other state or federal courts. Thus, the petition should be denied.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

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